U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 December 2006

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H. D.,
Claimant,

v. Case No.: **2005-BLA-05595**

VALLEY RIVER MINING, INC.,
Employer, and

OLD REPUBLIC INSURANCE CO.,
Carrier, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

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Appearances:

Andrew Delph, Esq., Wolfe, Williams & Rutherford, Norton, VA
For Claimant

Russell Presley II, Esq., Street Law Firm, Grundy, VA
For Employer/Carrier

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS AND DISMISSING EMPLOYER

This proceeding arises from a subsequent claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* (hereafter "the Act") filed by Claimant on October 2, 2003. This is the fourth claim filed by Claimant. The putative responsible operator is Valley River Mining Company ("Employer"), which is insured by Old Republic Insurance Company ("Carrier"). Claimant is currently receiving benefits from the Black Lung Disability Trust Fund.

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also

applicable, as this claim was filed after January 19, 2001.[1] 20 C.F.R. §718.2. In *National Mining Assn. v. Dept. of Labor,* 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.[2] The Department of Labor amended the regulations on December 15, 2003 for the purpose of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments submitted by the parties. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

Claimant filed three prior claims for black lung benefits. The first, filed on February 18, 1981, while Claimant was still employed in the coal mines, was denied by a claims examiner on April 7, 1981, because Claimant failed to establish that he suffered from pneumoconiosis, that the disease was caused at least in part by coal mine work, or that he was totally disabled by the disease. (DX 1).[3] No evidence was apparently developed in connection with that claim. The second, filed on May 10, 1995, was denied by Administrative Law Judge Richard K. Malamphy by Decision and Order of April 7, 1998, following a hearing held on January 27, 1998. (DX 3). The denial was premised upon Claimant's failure to establish that he suffered from pneumoconiosis. *Id.* At that time, the named responsible operator was J K & G Coal Corporation. *Id.* The third, filed on August 17, 2000, was denied by a claims examiner on March 17, 2001, because the evidence did not show the presence of pneumoconiosis, that it was caused at least in part by coal mine work, or that Claimant was totally disabled by the disease; it was also noted that the evidence did not support a finding of a material change of condition. (DX 3). J K & G Coal Company was still named as the responsible operator. *Id.*

The instant claim was filed on October 2, 2003. (DX 5). In a Schedule for the Submission of Additional Evidence, issued on May 13, 2004, a claims examiner made the preliminary determination that the Claimant would be entitled to benefits if a decision were issued at that time and that Valley River Mining, Inc., was the responsible operator liable for the payment of benefits. (DX 31). On November 12, 2004, a claims examiner issued a proposed decision and order awarding benefits. (DX 48). Employer disagreed and requested a hearing by counsel's letter of November 23, 2004. (DX 50). In view of the Employer's disagreement, payments were made to the Claimant from the Black Lung Disability Trust Fund, with a beginning date of entitlement of October 1, 2003 and one augmentee. (DX 54, 55). The case was transmitted to the Office of Administrative Law Judges for a hearing on February 23, 2005. (DX 55).

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[1] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[2] Several sections were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting was not upheld by the court.

[3] References to exhibits admitted into evidence at the hearing before me appear as "DX" for Director's Exhibits, "CX" for Claimant's Exhibits, and "EX" for Employer's Exhibits, followed by the exhibit number. The trial transcript will be referenced as "Tr." followed by the page number.

A hearing was held before the undersigned administrative law judge on September 30, 2005. At the hearing, Claimant's Exhibits 1 and 2[4] and Employer's Exhibits 1 through 7 were admitted into evidence, with additional exhibits to be admitted upon their submission. The Claimant was the only witness to testify. The record was kept open for the submission of the additional exhibits, as extended by my Order of December 20, 2005. Thereafter, Claimant's Exhibit 3 (a rereading of a July 19, 2005 x-ray by Dr. DePonte and Dr. DePonte's curriculum vitae), Employer's Exhibits 8 (the transcript of the deposition of Dr. Fino), and Employer's Exhibits 9 and 10 (a rereading of a July 5, 2005 x-ray by Dr. Wheeler and Dr. Wheeler's c.v.) were submitted. The Employer filed a Brief on March 29, 2006. Claimant's Exhibit 3 and Employer's Exhibits 9 and 10 are now admitted into evidence and the record is closed. **SO ORDERED.**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The issues before me are timeliness,[5] length of coal mine employment,[6] the existence of pneumoconiosis, its causal relationship with coal mine employment, total disability, causation of total disability, responsible operator, and subsequent claims. (Tr. 6-11; DX 55). Employer withdrew the issue of insurance at the hearing, the issues of timeliness and subsequent claims were added because they were mistakenly not included on the CM-1025 transmittal form, and the Employer preserved other issues that had been listed solely for appellate purposes. *Id.*

Medical Evidence

The medical evidence in this case is summarized in the Operator's Brief, filed on March 29, 2006.[7] In addition, each party submitted a prehearing report that indicated the evidence that each was relying upon as medical evidence in this case, consistent with the evidentiary limitations. The medical evidence previously of record is also summarized in Judge

[4] CX 2 was initially identified as the x-ray reading to be submitted post hearing but the numbering was changed to CX 3 because of an additional exhibit, a report by Dr. Rasmussen, that was offered by the Claimant as CX 2.

[5] There is a presumption of timeliness under 20 C.F.R. §725.308. I find that it has not been rebutted. *See generally Wyoming Fuel Co. v. Director, OWCP*, 90 F. 3d 1502 (10th Cir. 1996).

[6] The district director found 15 years of coal mine employment extending from December 1, 1970 until November 1994. (DX 47). Judge Malamphy found "at least 15 years of coal mine employment." (DX 3). The previous employer had stipulated to 13 years. *Id.* Claimant has alleged 25 years. (DX 3., Tr. 8, 16). Based upon my review of the entire record, I adopt the previous finding of "at least 15 years."

[7] In the "Medical Evidence Summary," on page 5 of the Operator's Brief lists a January 7, 2005 reading by Dr. Alexander of a September 7, 2004 x-ray that was not offered or received into evidence and was not designated by any party; that reading is also referenced in the body of the Brief. The Medical Evidence Summary also includes reference to a reading by Dr. Patel of the same September 7, 2004 x-ray which only appears by narrative in Dr. Rasmussen's report (CX 2). I have stricken references to readings of the September 7, 2004 x-ray for the reasons set forth below, in the discussion of the evidentiary limitations. In addition, I have stricken the reading by Dr. Fino of the September 9, 2004 x-ray (EX 2) as exceeding the evidentiary limitations. Employer could have introduced the excluded readings itself had it not already met the limitation with other evidence but as it chose not to do so, it is precluded from relying upon them. References to the stricken x-ray readings in the Operator's Brief will therefore be ignored. The summary of x-ray interpretations on page 5 of the Operator's Brief also does not mention that Dr. DePonte noted "A" size opacities on the July 19, 2005 x-ray.

Malamphy's April 7, 1998 decision (DX 2) and in the March 27, 2001 determination from the district director's office (DX 3).

Background and Employment History

Claimant, who was 57 years old at the time, was the only witness to testify at the hearing before me. He was a credible witness but was uncertain about dates and admitted to memory problems. (Tr. 19, 24). He testified that he worked for a total of 25 years as a coal miner and that his last employer was Valley River, which was operated by James Harmon. (Tr. 16). He only worked for Valley River once, and he last worked there in 1994, in the summer, to the best of his recollection; however, he later clarified that Valley River was not his last employer. (Tr. 17). At that time, he was paid about $14.00 per hour. (Tr. 19). His jobs were running a continuous miner, roof bolter, coal drill, and cutting machine, and he last worked as a section foreman. (Tr. 20). As a section foreman, he would run equipment and keep up the mines (including ventilation, rock dusting, and scoop operations); he would also fill in as necessary. *Id.* His most frequent job was running the continuous miner. *Id.* Claimant indicated that he stopped work in the mines because of lung and back problems. (Tr. 20-21). At the time of the hearing, Claimant described his breathing as "bad." (Tr. 21). He indicated that he could only walk about a quarter of a mile on level ground or only a few yards up hill, and, when climbing stairs, he would have to stop and rest after 20 or 30 steps. (Tr. 21). Dr. Smiddy in Kingsport is Claimant's current physician for his breathing. *Id.* Claimant denied any heart problems but said that his red count was high and his blood pressure was borderline. *Id.* Although Claimant denied smoking, he indicated that he had smoked from 1967, when he was in the service, until he quit in 1994. (Tr. 21-22). When he smoked, he only smoked about one pack of cigarettes per week. (Tr. 22).

On cross examination, Claimant clarified that his last coal mine employer was Country Boy Mining, in 1994. (Tr. 22). He quit before Country Boy shut down. (Tr. 23). He also testified that he worked for Souless Coal Company after Valley River Mining. (Tr. 25). Claimant also testified that he quit coal mining because Dr. Forehand told him to because of his lungs. (Tr. 23). Claimant also admitted that Dr. Forehand told him that he had Black Lung and was totally and permanently disabled from Black Lung, and that he received a written report to that effect. *Id.* While he could not remember telling a claims examiner in 1996 that he worked for Valley River Mining for less than one year, he indicated that his memory was getting worse over time and he would not have lied to her. (Tr. 24-25). Claimant filed a State rock dust claim but it was denied. (Tr. 25-26). He is receiving Social Security benefits based upon his back, lungs, and arthritis. (Tr. 27).

Discussion

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.,* 21 BLR --, BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3)*, citing* 20 C.F.R.

§§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id., citing* 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." *Id., citing* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." *Id., citing* 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." *Id., citing* 20 C.F.R. §725.456(b)(1). The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.,* 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

All admissible evidence from the prior claims is admitted into evidence as DX 1, DX 2, and DX 3. Section 725.309(d)(1) provides that "any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." Additionally, in *Church v. Kentland-Elkhorn Coal Corp.*, BRB Nos. 04-0617 BLA and 04-0617 BLA (Apr. 8, 2005)(unpub.), the Board stated that "as noted by the Director, when a living miner files a subsequent claim, all evidence from the first miner's claim is specifically made part of the record." Therefore, all evidence relating to the prior claims is admissible.

The evidence in the instant case is arguably not in compliance with the evidentiary limitations, with respect to the September 7, 2004 x-ray and September 9, 2004 x-ray.

(1) ***September 7, 2004 x-ray.*** Specifically, Claimant has designated two x-ray readings, relating to the July 5, 2005 and December 8, 2003 x-rays. In addition, a narrative recounting of Dr. Patel's "0/1" reading of a September 7, 2004 x-ray appears in Dr. Rasmussen's examination report (CX 2), and Employer has offered Dr. Scott's reading as a rebuttal reading (EX 1). However, one of the two readings listed by Claimant is actually a rebuttal reading to the examination report and is includable as such, so the narrative of Dr. Patel's reading could have been included as one of Claimant's readings. *See generally Ward v. Consolidation Coal Co.*, 23 B.L.R. 1-___, BRB No. 05-0595 BLA (Mar. 28, 2006) (allowing rebuttal to favorable report.) Claimant has not designated that reading, however, as a "0/1" reading is not positive for pneumoconiosis. Moreover, the reading itself is not of record, and I am reluctant to rely upon a narrative. Equally problematic is that there was apparently a positive interpretation by Dr. Alexander of the same x-ray that is summarized along with the other evidence in the Operator's

Brief but is not of record; clearly, the Claimant would have preferred substituting that reading. If the narrative of Dr. Patel's reading (appearing in Dr. Rasmussen's report) is not considered an x-ray reading, then Dr. Scott's reading is not admissible, as there is nothing to rebut. Thus, proceeding on the record as currently formulated would raise some issues concerning compliance with the evidentiary limitations. The most viable alternative is to strike the portion of Dr. Rasmussen's report referencing the reading (to the extent not inextricably intertwined with his report) and to strike Dr. Scott's interpretation as well. Accordingly, Employer's Exhibit 1 (Dr. Scott's reading) and the portion of Claimant's Exhibit 2 (Dr. Rasmussen's report for the September 7, 2004 examination) referencing Dr. Patel's reading (except as noted below) are **STRICKEN. SO ORDERED.**

(2) ***September 9, 2004 x-ray.*** Employer has designated readings relating to the September 9, 2004 x-ray by Dr. Scatarige (EX 3) and to the July 19, 2005 x-ray by Dr. Castle (EX 5) as its two x-ray readings. Thus, there is no basis for inclusion of Dr. Fino's reading of the September 9, 2004 x-ray attached to his report (EX 2) and, although the remainder of the report remains in evidence, that reading and references to it (except as noted below) are **STRICKEN**. **SO ORDERED.**

As a final matter, I note that as a general rule, when a medical report references inadmissible evidence, I will consider that report to the extent that it is not inextricably intertwined with the inadmissible evidence. In this case, in view of the confusion concerning the record, I will allow the references to the extent necessary to understand the basis for Dr. Rasmussen's and Fino's opinions, but I will not consider them as "x-ray evidence." However, Dr. Castle's and Dr. Fino's discussions at their depositions of their own interpretations of other x-rays that have not been designated by either party (except to the extent that the interpretations were admitted in previous claims) will be stricken.[8]

Responsible Operator

Under the recently amended regulations, Section 725.495(c) places the burden of poof upon the named responsible operator to establish that it is not the potentially liable operator that most recently employed the miner. Section 725.494(c) provides, inter alia, that for an operator to be deemed a potentially liable operator, the miner must have been employed by the operator for a cumulative period of not less than one year. The definition of "Year" in section 725.101(a)(32) provides:

> (32) *Year* means a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days." A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received

[8] At his deposition, Dr. Fino very eloquently explained why he would want to review all of the available evidence and how, from a medical standpoint, the evidentiary limitations make no sense. (EX 8 at 24). While I am inclined to agree with him, the Benefits Review Board has made it clear that I have no discretion in waiving the limitations without making a finding of good cause, which cannot be premised upon relevance alone or upon the stipulation of the parties.

> pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

20 C.F.R. § 725.101(a)(32). As the Court of Appeals for the Fourth Circuit noted in *Armco, Inc. v. Martin,* 277 F.3d 468 (4th Cir. 2002) (citing *Northern Coal Co. v. Director, OWCP,* 100 F.3d 871 n. 8 (10th Cir. 1996)), in addressing the regulation's predecessor (former section 725.493(b) (1999)), the responsible operator determination depends upon the resolution of two issues: (1) whether the Claimant was employed for a period of one year or partial periods totaling one year and (2) whether the coal mine employment was "regular," meaning that during the year the miner was regularly employed in or around a coal mine for a minimum of 125 days. The initial determination may include periods of approved absences while the latter (125-day) determination cannot.[9]

I agree with the Director that the Social Security records support a finding that Valley River Mining was properly named as the responsible operator in this case,[10] but I nevertheless find Employer's arguments to be persuasive. In this regard, the Social Security records substantiate that Claimant worked for Valley River Mining in 1992, 1993, and 1994. [11] (DX 10). His earnings for 1993 alone indicate that he worked in excess of the 125 days required, based upon earnings of $19,678.78 and a $14 hourly rate. The problem is that the same exact earnings are listed for 1994. It is therefore possible that the listing was due to an error and that Claimant was not employed by Valley River in either 1993 or 1994, meaning that he may not have worked for Valley River for a cumulative period of at least one year. While the inclusion of an incorrect amount does not necessarily mean that the Claimant was not employed by Valley River in both 1993 and 1994, Employer points to statements made by the Claimant to a senior claims examiner at an informal conference held on July 24, 1996, only two years after the Claimant terminated his coal mine employment. At that time, in the Proposed Decision and Order Memorandum of Conference, Senior Claims Examiner Peggy Ann Clements stated (addressing the earlier, incomplete Social Security records and Claimant's assertions):

> The claimant alleges at the conference that his last coal mine work for a period of one year was with J K & G Coal Corporation from 1990 to 1993. The SSA wage record shows substantial earnings for the years of 1991-92 with less than a year of earnings posted (Westfork Coal) for 1993. He alleges other mining work after J

[9] In amending the regulations, the Department stated that "in order to have one year of coal mine employment, the regulations contemplate an employment relationship totaling 365 days, within which 125 days were spent working and being exposed to coal mine dust, as opposed to being on vacation or sick leave." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79959 (Dec. 20, 2000).

[10] The claims examiner also references W-2s, 1040 income tax forms, and pay stubs in the file (DX 32), but none of these relate to Valley Fork and the only one dated after 1991 is a single W-2 form for Country Boy in 1994, two copies of which appear in the record. (DX 9).

[11] An earlier version of the Social Security records does not include any employment after 1992 for Valley River Mining Inc. although it does include some earnings for another company (Westfork Coal Corporation) in 1993. However, that version states: "Earnings for the years after 1993 may not be shown, or only partially shown, because they may not yet be on our records." (DX 2). Although in its brief, the Employer stated that the earlier Social Security records showed earnings of $10,397.87 for 1993 (Operator's Brief at 13-14), that statement is incorrect as those wages were associated with Westfork Coal Corp., a different company.

> K & G Coal, but . . . **he alleges he did not work a year with either Valley River Mining Inc. or Indian Creek or Westfork Coal Corporation or Country Boy Coal.**
>
> . . . . Claimant alleges his last coal mine employment was from 8-94 to 11-94 with Country Boy – less than a year of CME. Claimant stated he never work[ed] for Country Boy, Westfork or Valley River in previous years. [Emphasis added.]

(DX 2). Thus, at a time when Claimant's employment was fresher in his mind, as it was only two years later, Claimant denied having been employed by Valley River Mining Inc. for more than one year.

In considering this issue, I am concerned about possible prejudice to the Insurer in this case in developing pertinent evidence, and I therefore draw the inference that such evidence would have been favorable to it. Although it would have been preferable to have actual earnings records from Valley River, none were sought in 1996, based upon the Claimant's statements and the incomplete Social Security records, and the company is now defunct. At this point in time, it is unlikely that the records could be obtained. As indicated above, Claimant states that he gave all of his records to the Department of Labor, but, while he had extensive tax records relating to his self employment in the 1970's and 1980's, the only record after 1991 is a single W-2 form for 1994, relating to Country Boy Mining. (DX 9). I am therefore concerned that the Insurer has been prejudiced because information it likely could have obtained in 1996 concerning the actual dates of Claimant's employment with Valley River is not likely to be retrievable now. *See generally Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799 (4th Cir. 1998) (prejudice due to 17-year delay in notification); *see also Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000) (delay and loss of records.)

In view of the above, I find that Valley River Mining Inc. should not have been named as the responsible operator.

While not necessary to my ruling, I note that J K & G, which was named the operator at the time of the previous claims, should have remained the responsible operator, based upon the evidence before me. In this regard, assuming that J K & G was the last operator to employ the Claimant for a period of one year, the only other issue is whether it is financially capable of paying benefits. 20 C.F.R. §725.495(a). However, it admitted as much in the controversion by its insurer, Royal Sunalliance, on behalf of Security Ins. Co. Of Hartford. (DX 23). It also stated that it employed the Claimant from November 6, 1991 to November 6, 1992. *Id.*

In view of the above, I find that Valley River Mining Inc. should be dismissed as responsible operator. It is therefore unnecessary to consider the Employer's other arguments concerning res judicata, law of the case, and collateral estoppel.

As amended, 20 C.F.R. §725.465(b) provides that "[t]he administrative law judge shall not dismiss the operator designated as the responsible operator by the district director, except upon the motion or written agreement of the Director." Presumably this provision means that the operator may not be dismissed on an interlocutory basis and does not affect my ability to resolve

the responsible operator issue. As the instant case is a final disposition, dismissal would be appropriate. In view of the Director's finding that the Claimant is entitled to benefits, this case could be remanded for payment. However, in view of section 725.465(b), as this matter has proceeded to hearing and the appealability of my decision would be moot if the Claimant were found to be not entitled to benefits, I will proceed to consideration of the merits of this case.

Subsequent Claims Analysis

As noted above, the instant case is a subsequent claim, because it was filed more than one year after the last denial of benefits in March 2001. *See* §725.309(d). Previously, such a claim would be denied based upon the prior denial unless the Claimant could establish a material change in conditions. *See* 20 C.F.R. §725.309(d). The Fourth Circuit Court of Appeals held that to establish that a material change in condition has occurred, the Claimant must prove, by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements adjudicated against him in the prior denial. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1986)(en banc).[12] If the miner establishes the existence of that element, he has demonstrated a material change. *Id.* Then the administrative law judge must consider whether all of the evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits. *Id.*

The amended regulations have replaced the material-change-in-conditions standard with the following standard:

> (d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. **A subsequent claim** shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim **shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement** (see §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) **has changed since the date upon which the order denying the prior claim became final.**[13] The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
>
> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, **the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based.** For

[12] Because Claimant's last exposure to coal mine dust occurred in Virginia, this claim arises within the territorial jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Broyles v. Director, OWCP*, 143 F.3d, 21 BLR 2-369 (10th Cir. 1998).

[13] For a miner, the conditions of entitlement include whether the individual (1) is a miner as defined in the section; (2) has met the requirements for entitlement to benefits by establishing pneumoconiosis, its causal relationship to coal mine employment, total disability, and contribution by the pneumoconiosis to the total disability; and (3) has filed a claim for benefits in accordance with this part. 20 C.F.R. §725.202(d) *Conditions of entitlement: miner.*

example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) **If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.** . .

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim. . . .[Emphasis added.]

20 C.F.R. § 725.309(d) (2003). Thus, it is necessary to look at the new evidence relating to each medical condition of entitlement upon which the prior denial was based to determine whether it establishes that condition of entitlement.

The prior claim was denied because the evidence did not show the presence of pneumoconiosis, that it was caused at least in part by coal mine work, or that Claimant was totally disabled by the disease. Thus, I must first determine whether the new evidence establishes that the Claimant has established at least one of these elements.

Existence of Pneumoconiosis based upon New Evidence

Under 20 C.F.R. §718.202(a)(1)-(4), a finding of pneumoconiosis can be made based upon x-ray evidence, biopsy or autopsy evidence, presumption, or the reasoned medical opinion of a physician based on objective medical evidence. In addition, the Fourth Circuit Court of Appeals has held that all types of relevant evidence must be weighed together in determining whether a claimant has pneumoconiosis. *Island Creek Coal Company v. Compton*, 211 F.3d 203 (4th Cir. 2000). As this case arises in the Fourth Circuit, I must therefore weigh the evidence in accordance with *Compton.*

Under the amended regulations, "pneumoconiosis" is defined to include both clinical and legal pneumoconiosis:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

(1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent

> deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracolsilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal Pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which first may become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (as amended December 20, 2000).

X-Ray Evidence. The x-ray evidence is conflicting. In determining the existence of pneumoconiosis based on chest x-ray evidence, "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a) (1). The Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified Radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984).

In connection with the instant claim, after excluding the September 7, 2004 x-ray, one reading of the September 9, 2004 x-ray (by Dr. Fino), and the quality reading of the December 8, 2003 x-ray (by Dr. Barrett), there were eight readings of four x-rays: four were positive, three were negative, and one found opacities of "0/1" profusion (which does not qualify as evidence of pneumoconiosis under the regulations, 20 C.F.R. §718.102). Thus, after excluding the "0/1" reading, based upon numerical superiority alone, the x-ray evidence weighs slightly in favor of a finding of pneumoconiosis.

Turning to the x-rays individually, they were interpreted as follows:

1. The December 8, 2003 x-ray was interpreted as positive for pneumoconiosis by two dually qualified readers (Drs. Patel and Alexander) and as negative for pneumoconiosis by one dually qualified reader (Dr. Wheeler). That x-ray may be deemed to be positive for pneumoconiosis.
2. The September 9, 2004 x-ray was interpreted as negative for pneumoconiosis by one dually qualified reader (Dr. Scatarige).[14] That x-ray may be deemed to be negative for pneumoconiosis.
3. The July 5, 2005 x-ray was found to be positive by one B-reader (Dr. Rasmussen) and as negative by one dually qualified reader (Dr. Wheeler). In view of Dr. Wheeler's superior qualifications, that x-ray may be deemed to be negative for pneumoconiosis.
4. The July 19, 2005 x-ray was found to be "0/1" (which does not qualify as evidence of pneumoconiosis) by one B-reader (Dr. Castle) and as positive by one dually qualified reader (Dr. DePonte). In view of Dr. DePonte's superior qualifications, that x-ray may be deemed to be positive for pneumoconiosis.

Thus, of the four x-rays, taken into account the qualifications of the readers, two may be deemed to be positive for pneumoconiosis and two may be deemed to be negative.

In sum, the x-ray evidence is equivocal. I find that it neither supports nor undermines a finding of pneumoconiosis. Therefore, as it is the Claimant's burden of proof, I find that the chest x-ray evidence does not establish the existence of pneumoconiosis and that Claimant has not established the presence of pneumoconiosis pursuant to the chest x-ray evidence set forth at 20 C.F.R. § 718.202(a)(1).

Autopsy or Biopsy Evidence. As there is no autopsy or biopsy evidence of record, Claimant has failed to establish the presence of the disease under 20 C.F.R. §718.202(a)(2).

Complicated Pneumoconiosis and Other Presumptions. A finding of opacities of a size that would qualify as "complicated pneumoconiosis" under 20 C.F.R. §718.304 results in an irrebuttable presumption of total disability. For the reasons set forth below, I find that the Claimant has not established complicated pneumoconiosis. The additional presumptions described in section 718.202(a)(3), which are set forth in 20 C.F.R. §718.305 and 20 C.F.R. §718.306 are also inapplicable, *inter alia*, because they do not apply to claims filed after January 1, 1982 or June 30, 1982, respectively. Further, section 718.306 does not apply, because the claim is not for death benefits.

If Claimant can establish complicated pneumoconiosis (also known as "massive pulmonary fibrosis"), under the criteria set forth in 30 U.S.C. § 921(c)(3) and §718.304, he is entitled to an irrebutable presumption of total disability due to pneumoconiosis. *See generally Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (upholding constitutionality of presumption). Pursuant to §718.304, a claimant may be entitled to the irrebuttable presumption of total disability due to pneumoconiosis, under paragraph (a), based upon a chest x-ray finding of one or more large opacities (*i.e.,* greater than 1 centimeter in diameter) which would be classified as Category A, B, or C under the applicable classification requirements (such as ILO

[14] As discussed above, an additional reading of that x-ray by Dr. Fino was excluded.

and UICC); under paragraph (b), based upon a biopsy yielding "massive lesions in the lung"; or, under paragraph (c), based upon a condition which "when diagnosed by means other than those specified in paragraphs (a) and (b) . . . could reasonably be expected to yield the results described in paragraph (a) or (b) . . . had diagnosis been made as therein described: *provided, however,* that any diagnosis made under this paragraph shall accord with acceptable medical procedures." §718.304.

These clauses are intended to describe a single, objective condition, and subsection (a) provides an objective standard against which the other subsections can be measured. *See Eastern Associated Coal Corporation v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255-57 (4th Cir. 2000). The statutory definition of complicated pneumoconiosis need not be congruent with a medical or pathological diagnosis. *Id.* at 257. *See also Double B Mining, Inc. v. Blankenship,* 177 F.3d 240 (4th Cir. 1999) (declining to adopt blanket 2 centimeter rule for pathology findings and instead requiring an equivalency determination to be made); *Handy v. Director, OWCP,* 16 B.L.R. 1-73 (1990) (finding that an x-ray report indicating the absence of small or large opacities consistent with pneumoconiosis, but noting the presence of a 1.0 centimeter lesion in the right lung, was legally insufficient to establish the existence of complicated pneumoconiosis because section 718.304(a) requires a finding of one or more large opacities greater than one centimeter in diameter.) An equivalency determination must be made regardless of whether there is x-ray or pathological evidence of record. *Braenovich v. Cannelton Industries, Inc.*, 22 B.L.R. 1-237 (2003). In *Braenovich*, the Board upheld the administrative law judge's finding of complicated pneumoconiosis based upon his equivalency determination that a 1.5 centimeter lesion on autopsy would produce an opacity of equivalent size on x-ray even though he found both the x-ray evidence and the autopsy evidence to be insufficient to establish complicated pneumoconiosis, because "'[e]vidence under one prong can diminish the probative force of evidence under another prong if the two forms of evidence conflict.'" *Id., citing Scarbro.*

While the section does not specifically require that a diagnosis of pneumoconiosis be associated with the lesions found, that requirement has been read into the regulation by the Benefits Review Board. In *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991) (*en banc*), the Board stated that, because section 718.304 offered no opportunity for rebuttal, failure by an administrative law judge to consider all relevant evidence at the invocation stage could constitute a violation of an opposing party's due process rights. The Board held that:

> . . . the administrative law judge shall first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b) and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established.

The Board noted that CT scans fit under subsection (c). *Id.* In *Braenovich, supra,* the Board indicated that under the Fourth Circuit's mandate in *Blankenship, supra*, "the administrative law judge is bound to perform equivalency determinations to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption."

There is some evidence of complicated pneumoconiosis, in that Dr. Alexander, a dually qualified reader, found opacities of "A" category on the July 11, 2004 x-ray; Dr. DePonte, also a dually qualified reader, found "A" large opacities on the July 19, 2005 x-ray; and Dr. Rasmussen, a B-reader, found opacities of "A" profusion on the July 5, 2005 x-ray. The July 11, 2004 and July 19, 2005 x-rays were read by Dr. Wheeler, a dually qualified reader, as negative for either simple or complicated pneumoconiosis, and the July 19, 2005 x-ray was interpreted by Dr. Castle, a B-reader, as showing only "0/1" pneumoconiosis. The September 9, 2004 x-ray was read as negative for complicated pneumoconiosis by the single dually qualified reader who read it, Dr. Scatarige. Thus, the x-ray evidence is split on the issue of whether the Claimant had "A" size opacities. Looking at the findings of "A" opacities by the radiologists, Dr. Alexander and Dr. DePonte, it is clear that, while Dr. Alexander diagnosed "complicated pneumoconiosis," Dr. DePonte merely identified opacities and did not make a diagnosis. Moreover, while Dr. Rasmussen identified "A" type large opacities based upon his own reading of the July 5, 2005 x-ray, and he diagnosed coal worker's pneumoconiosis, he did not actually diagnose complicated pneumoconiosis or even suggest it as a viable explanation for the large opacities. Rather, he said that he could not rule out cancer and recommended that the Claimant see his personal physician. On balance, given that only a single x-ray reading actually found opacities determined to be indicative of complicated pneumoconiosis, I find that the new x-ray evidence does not establish complicated pneumoconiosis, and I find the Claimant has not satisfied his burden of establishing complicated pneumoconiosis under any of the other subsections or under section 718.304 as a whole because there is no other evidence of complicated pneumoconiosis.

Thus, Claimant has failed to establish the presence of pneumoconiosis under 20 C.F.R. §718.202(a)(3).

Medical Opinions on Pneumoconiosis. Medical opinions were rendered in connection with this subsequent claim by Drs. Rasmussen, Castle, and Fino.

(1) Dr. Donald L. Rasmussen, a board-certified internist who specializes in pulmonary diseases, examined the Claimant on three occasions in connection with the instant claim: (1) on December 8, 2003, in connection with the Department of Labor examination (DX 14); (2) on September 7, 2004, for the Claimant (CX 2) ; and (3) on July 5, 2005, for the Claimant (CX 1). In the 2003 and 2005 reports, he found that the claimant suffered from clinical pneumoconiosis (coal worker's pneumoconiosis) and legal pneumoconiosis (COPD/Emphysema resulting from the combined effects of smoking and coal mine dust exposure), and he went on to find that coal mine dust exposure was a major contributing factor to his disabling lung disease. In his report relating to the September 7, 2004 examination, in response to the x-ray reading by Dr. Patel (that has been excluded) he noted:

> Impairment of lung function is also known to occur absent x-ray evidence of pneumoconiosis. This is due in part to the imperfection of the x-ray, which may fail to reveal even significant pneumoconiosis when present. . .Impairment in function is also known to be independent of x-ray findings. [Citations omitted.]

(CX 2). In his July 5, 2005 examination report, Dr. Rasmussen noted that both cigarette smoking and coal mine dust exposure "cause similar and indistinguishable loss of lung function." (CX 1).

(2) Dr. James R. Castle, a board-certified pulmonologist, examined the Claimant on July 19, 2005, based upon which he prepared an August 30, 2005 report and had his deposition taken on September 19, 2005. (EX 5, 7). Dr. Castle opined that the Claimant did not suffer from coal worker's pneumoconiosis (clinical pneumoconiosis) and he further opined that his respiratory disability (manifested by variable ventilatory and arterial blood gas abnormalities) was unrelated to coalworkers' pneumoconiosis and was probably due to some other process, such as idiopathic interstitial pulmonary fibrosis or usual interstitial pneumonitis. (EX 5).

Dr. Castle explained his opinion further at his deposition. (EX 7). Dr. Castle believed that the Claimant had sufficient respiratory capacity to perform his last coal mining job, as he testified at his deposition, taking into consideration the declining oxygenation upon exercise, which was still not abnormal for his age and the altitude, as well as the very mild degree of airway obstruction. (EX 7 at 19-22). Based upon the totality of information, he determined that the Claimant did not have any chronic lung disease or impairment or its sequelae arising out of coal mine employment. *Id.* at 22.

(3) Dr. Gregory J. Fino, a board-certified pulmonologist, examined the Claimant on September 9, 2004, based upon which he prepared a February 8, 2005 examination report and had his deposition taken on September 28, 2005. (EX 2, 8). Dr. Fino did not find clinical pneumoconiosis or legal pneumoconiosis. In this regard, he noted that there had been significant changes in the chest x-rays between 2003 and 2004 and expressed his concerns, noting that the changes were far too rapid to be related to simple coal workers' pneumoconiosis, and further noting that the bilateral lower lobe interstitial changes were not the type of abnormalities that would be expected in a coal mine dust related condition. He found some granulomas and was concerned that some of them were either cavitating granulomata suggesting tuberculosis or they actually represented metastatic lesions. He also opined that, although the Claimant was disabled from a respiratory standpoint, the disability was "totally unrelated to the inhalation of coal mine dust." He stated that his working diagnosis was an idiopathic pulmonary fibrosis. (EX 2).

At his deposition, Dr. Fino explained that the Claimant had sufficient coal dust exposure to develop coal worker's pneumoconiosis but, in his estimation, the smoking history of one pack per week for 30 years, which only amounted to three or four pack years, was insufficient to make him susceptible to lung disease. (EX 8 at 9-10.) He later explained that the carboxyhemoglobin level was normal, and there was a typo. in his report. *Id.* at 21. He noted that he only found diminished breath sounds on physical examination and nothing else of significance. *Id.* at 10-11. After reviewing the studies of Dr. Castle and Dr. Rasmussen, along with his own (invalid) studies, Dr. Fino concluded that the Claimant probably had a combined obstruction and restriction that resulted in a respiratory impairment. *Id.* at 14-16. He expressed his opinion that the changes were not caused by coal dust, and that diffuse interstitial pulmonary fibrosis was his leading diagnosis, but that sarcoidosis or other interstitial processes were also possible. *Id.* at 16. Based upon the arterial blood gases, he believed Claimant could still exercise from an oxygen standpoint, but the reduced diffusing capacity suggested that it was having some effect. *Id.* at 17-18.

In evaluating these opinions, I will take into consideration both the qualifications of the physicians and the content of their opinions from a quality standpoint. The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 B.L.R. 2-323 (4th Cir. 1998); *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). In assessing the probative values of the opinions themselves, I note that a doctor's opinion that is both reasoned and documented, and is supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *See Fields v. Island Creek Coal Co.,* 10 B.L.R. 1-19 (1987). A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis, and a "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions. *Fields, supra.*

Looking at the qualifications of the physicians, I find that Drs. Rasmussen, Fino, and Castle are highly qualified to express opinions. Dr. Rasmussen has worked extensively in the area of pulmonary diseases in miners, while Drs. Fino and Castle are highly qualified board-certified pulmonologists. Although Dr. Rasmussen lacks that credential, I find that his experience is such that the probative value of his opinions is not undermined thereby. I will therefore proceed to consideration of the opinions themselves.

As noted above, I have found the x-ray evidence to be equivocal and have therefore found that the Claimant has not met his burden of proof based upon that evidence to establish clinical pneumoconiosis, a factor which is of some significance in my consideration of the medical opinion evidence.

Even if a claimant cannot establish "clinical pneumoconiosis," he may nevertheless establish by the medical opinion evidence that he suffers from "legal pneumoconiosis" (i.e., chronic obstructive pulmonary disease [COPD] resulting from coal mine dust exposure.) In amending the regulations, the Department of Labor discussed the strong epidemiological evidence supporting an association between coal dust exposure and obstructive pulmonary disability (65 Fed. Reg. 79937-79945 (Dec. 20, 2000)), but it nevertheless chose to require that each individual claimant establish by a preponderance of the evidence that such an association occurred in that individual's case. *Id.* at 79938. This is a difficult burden to meet in cases, such as the instant case, where the x-ray evidence is equivocal.

In evaluating these opinions, I note that each of these physicians has relied upon a complete physical examination, clinical tests, and a personal and work history. In this regard, each of these physicians has noted the Claimant's limited cigarette smoking history of only one pack weekly, ending in 1994, although Dr. Castle questioned the accuracy of that history. Each has also noted the Claimant's coal mining history, which extended over more than twenty years, ending in 1994.

On balance, I find Dr. Rasmussen's opinion, to the effect that Claimant's disability resulted from the combined effects of cigarette smoking and coal mine dust exposure, to be more persuasive than the suggestion by Drs. Castle and Fino that he suffers from some form of an idiopathic lung disease.[15] In this regard, there has been no diagnosis of idiopathic pulmonary

[15] By definition, an idiopathic condition is one for which the cause is unknown.

fibrosis or usual interstitial pneumonitis. None of the dually qualified B-readers and board certified radiologists found those conditions on the x-rays. Further, while I am prepared to accept the fact that Claimant's presentation is not typical of exposure to coal mine dust, they have failed to explain why it is consistent with the other conditions, or, even if he does have some form of idiopathic lung disease, how coal mine dust exposure can be excluded as a factor in the development of that disease.[16] Both Dr. Castle and Dr. Fino argued that there was a rapid onset to the disease, based upon the x-rays, but I am unable to agree based upon my review of the entire record, which is consistent with a steady decline. As Dr. Fino acknowledged, the Claimant has complained of shortness of breath for 15 years and the changes were not of sudden onset if one accepts the proposition that the Claimant had progressive pneumoconiosis. *Id.* at 21-22. Indeed, the amended regulations (cited above) accept the proposition that pneumoconiosis may not become apparent until years after a miner leaves the mines. Moreover, the dually qualified radiologists who reviewed the films did not reach the same conclusions as Drs. Castle and Fino. Accordingly, I find that Claimant has established legal pneumoconiosis based upon the newly submitted medical opinion evidence, and I find that Claimant has established that he suffers from pneumoconiosis by the new medical opinion evidence pursuant to 20 C.F.R. § 718.202(a)(4).

All Evidence on Pneumoconiosis. Pursuant to *Compton, supra*, in considering all of the evidence submitted in connection with the current claim, both favorable and unfavorable, I find that the new evidence establishes the presence of legal pneumoconiosis. While the Claimant may also suffer from clinical pneumoconiosis, Claimant has not established it by a preponderance of the evidence in view of the equivocal x-ray evidence.

In view of my finding that the Claimant has established an element upon which the previous claim was denied, this case must be considered on the merits.

Merits of the Claim

The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Director, OWCP v. Greenwich Collieries*, the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. *See Id.* Thus, in order to prevail in a black lung case, a claimant must establish each element by a preponderance of the evidence.

Existence of Pneumoconiosis based upon All Evidence

As stated above, I have found legal pneumoconiosis to be established based upon the new evidence. I must now proceed to consider whether I reach the same conclusion based upon all of the evidence of record, including evidence from the prior claims.

[16] Based upon his own interpretation of the x-rays, Dr. Castle determined that Claimant suffered from some kind of "transient process" that resolved itself. (EX 7 at p. 15). As noted above, Dr. Castle's opinion cannot be based upon x-ray interpretations that are not of record, and the ones that are of record of the x-rays he mentions are not consistent with his readings.

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In the case of x-ray evidence, more recent positive evidence may be credited over older negative evidence, but the Benefits Review Board has stated that "it is irrational to credit the most recent evidence strictly on the basis of its chronology, if that evidence is negative for pneumoconiosis." *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (BRB 2003).

While the medical experts dispute the cause of, or rapidity of, the progression, each of the reviewing physicians has indicated that the Claimant's pulmonary condition has been progressing. Such progression is consistent with the recognized progressive nature of the disease. Thus, while the evidence previously of record does not preponderate in favor of a finding of pneumoconiosis, I find that the newer evidence is entitled to additional weight. Therefore, I find that Claimant has established the existence of pneumoconiosis.

Causal Relationship with Coal Mine Employment

As Claimant has established that he suffers from pneumoconiosis and that he has worked in coal mining for over ten years, he is entitled to a rebuttable presumption that the disease arose from coal mine employment. 20 C.F.R. § 718.203(b) (2001). I find that the presumption has not been rebutted.

Total Disability

The regulations as amended provide that a claimant can establish total disability by showing pneumoconiosis prevented the miner "[f]rom performing his or her usual coal mine work," and "[f]rom engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 20 C.F.R. §718.204(b)(1). Where, as here, complicated pneumoconiosis has not been established, total disability may be established by pulmonary function tests, arterial blood gas tests, evidence of cor pulmonale with right sided congestive heart failure, or physicians' reasoned medical opinions, based on medically acceptable clinical and laboratory diagnostic techniques, to the effect that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in the miner's previous coal mine employment or comparable work. 20 C.F.R. §718.204(b)(2). For a living miner's claim, it may not be established solely by the miner's testimony or statements. 20 C.F.R. §718.204(d)(5). Claimant's job description must be considered in light of the medical evidence.

Pulmonary Function Tests. Pulmonary function tests were taken on December 8, 2003, September 7, 2004, September 9, 2004, July 5, 2005, and July 19, 2005. Under subparagraph (i) of section 718.204(b)(2), total disability is established if the FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, for the miner's age, sex and height, if in addition, the tests reveal qualifying FVC or MVV values under the tables, or an FEV1/FVC ratio of less than 55%. None of the tests were qualifying based upon those

criteria. Moreover, all of these tests produced nonqualifying FEV1 values, with the exception of the prebronchodilator values taken before Dr. Fino. However, Dr. Fino found the spirometry to be invalid and that conclusion has not been disputed; in any event, the test did not produce qualifying FVC or FEV1/FVC values, and no MVV values were recorded. I find the more recent tests to have more probative value in view of the progressive nature of the disease; however, the previous tests were also nonqualifying. Accordingly, I find that the Claimant has failed to establish total disability under section 718.204(b)(2)(i) based upon the pulmonary function tests.

Arterial Blood Gas Studies. Arterial blood gases were taken on December 8, 2003, September 7, 2004, September 9, 2004, July 5, 2005, and July 19, 2005 and produced the following values, before and after exercise:

Exhibit No.	Date	Physician	pCO2	pO2	Qualifying?
DX 14	12/08/2003	Rasmussen	33 (rest) 33 (exercise)	72 (rest) 66 (exercise)	No Yes
CX 2	09/07/2004	Rasmussen	35 (rest) 32 (exercise)	73 (rest) 64 (exercise)	No Yes
EX 2	09/09/2004	Fino	31.3 (rest)	91.8 (rest)	No
CX 1	07/05/2005	Rasmussen	34 (rest) 28 (exercise)	80 (rest) 88 (exercise)	No No
EX 5	07/19/2005	Castle	33.2 (rest) 33.3 (exercise)	79.5 (rest) 71.5 (exercise)	No No

These values were uniformly nonqualifying at rest and two out of four exercise values were also nonqualifying. In view of the exertional level required by Claimant's job, I find the exercise values to be more probative. None of the ABG studies from Claimant's previous claims provided qualifying values. Again, in view of the progressive nature of the disease, I find the more recent tests to have more probative value. However, the two most recent tests did not produce qualifying values. Accordingly, I find that the Claimant has failed to establish total disability under section 718.204(b)(2)(ii) based upon the arterial blood gas evidence.

Cor pulmonale with right-sided congestive heart failure. There is no evidence of cor pulmonale or congestive heart failure, so Claimant has not established total disability under section 718.204(b)(2)(iii).

Medical opinions. As summarized above, medical opinions were rendered by Drs. Rasmussen, Castle, and Fino in the instant case. Drs. Rasmussen and Fino found the Claimant to be totally disabled while Dr. Castle did not.

In his most recent examination report, relating to the July 5, 2005 examination, Dr. Rasmussen recounted the findings on laboratory studies and stated the following:

> These studies indicate at least moderate loss of lung function as reflected by the patient's ventilatory impairment, his reduced single breath diffusing capacity and his impairment in oxygen transfer during moderate exercise (17.8 ml/kg/min.). He does not retain the pulmonary capacity to perform work requiring an oxygen

> uptake of 25-30 ml/kg/min. required of his last regular coal mine job. In addition, he would exhibit progressive impairment in oxygen transfer were he to attempt such work.

(CX 1). In reaching that conclusion, Dr. Rasmussen noted that Claimant's last job as a section foreman in a small coal mine (which required him to operate equipment, unload supplies, set timbers, shovel to clean up, rock dust, and help make belt moves and splices) involved "considerable heavy and some very heavy manual labor." *Id.*

Dr. Fino also concluded that the Claimant was disabled from a respiratory standpoint although, as noted above, he did not attribute the disability to coal mine dust inhalation. (EX 2 at 9). In this regard, based upon his own clinical tests and those of Dr. Castle and Dr. Rasmussen, Dr. Fino concluded that the Claimant probably had a combined obstruction and restriction that resulted in a respiratory impairment. Based upon the ABGs and diffusing capacity tests, he concluded that, while Claimant could still exercise from an oxygen standpoint, his oxygenation had been affected. (EX 8).

In contrast, Dr. Castle concluded that the Claimant could perform his last coal mine job from a respiratory standpoint. At his deposition, he explained that the declining oxygenation upon exercise shown on the ABGs was not abnormal when Claimant's age was taken into consideration and an adjustment was made based upon the altitude. He also explained that the very mild degree of airway obstruction was insufficient to be disabling. (EX 7 at 19-22).

Based upon a review of these opinions, I find that Drs. Rasmussen and Fino have more adequately discussed the requirements of Claimant's coal mine job as a foreman, which involved some very heavy work, as he had to fill in for all of the miners who were absent, as necessary. I further find that the more recent evidence has more probative value in establishing the Claimant's current disability, particularly in view of the progressive nature of the disease. Thus, I find that the medical opinion evidence under section 718.204(b)(2)(iv) establishes total disability.

Section 718.204(b)(2) as a whole. Taking into account all of the evidence of record, I find that Claimant is incapable of performing his last or usual coal mine employment on a pulmonary or respiratory basis. Based upon my review of the Claimant's testimony, the job history he gave to physicians, and other matters of record, I conclude that the Claimant's employment as a foreman involved heavy manual labor. Further, I find that the medical evidence, and specifically the better-reasoned medical opinions interpreting that evidence, establishes that he is totally disabled by a pulmonary or respiratory condition.

Causation of Total Disability

After establishing that a miner is totally disabled, a claimant must still establish that the miner's total disability was caused at least in part by his or her coal mine employment. 20 C.F.R. §718.204(a). If the presumptions are not available to a claimant, that claimant must prove the etiology of the disability by a preponderance of the evidence, even if he or she has proven the existence of total disability. *See Tucker v. Director,* 10 B.L.R. 1-35, 1-41 (1987).

Under the amended regulations, a claimant must show that "pneumoconiosis . . . is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment," which means that it had a material adverse effect on the miner's respiratory or pulmonary condition or that it materially worsened a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. § 718.204(c)(1). In making this determination, the finder-of-fact must not take into account any non-pulmonary or non-respiratory impairments a miner may have, unless said condition causes a chronic respiratory or pulmonary impairment. 20 C.F.R. §718.204(a).

Thus, the new regulations place an additional burden upon the Claimant to establish a substantial contribution by pneumoconiosis. In this regard, the Department of Labor commented in the preamble to the regulations that "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. 79946 (Dec. 20, 2000). However, the new regulations also allow for a finding of total disability due to pneumoconiosis even when there is another totally disabling respiratory or pulmonary condition if pneumoconiosis has a material adverse effect or materially worsens an unrelated total respiratory or pulmonary disability. *See* 20 C.F.R. § 718.204 (2001).[17]

The Benefits Review Board had an opportunity to examine this new provision in *Gross v. Dominion Coal Corp.*, 23 B.L.R. 1-10 (2003).[18] In that decision (slip op. at 6 to 7), the Board held that an opinion (by Dr. Forehand) stating that pneumoconiosis was one of two causes of the miner's totally disabling pulmonary condition, but which did not attempt to specify the relative contributions of coal dust exposure and cigarette smoking, was sufficient to satisfy the new standard. The Board found that the doctor's opinion satisfied that "material adverse effect" requirement. The Board also found that substantial evidence supported the administrative law judge's discrediting of the opinion offered by the employer's expert (Dr. Castle) under *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 B.L.R. 2-269 (4th Cir. 1997), which held that an administrative law judge should consider the explanation provided by an expert offering an opinion.

However, in its unpublished decision in *Phillips v. Westmoreland Coal Company,* BRB No. 04-0379 BLA (Benefits Review Board Jan. 17, 2005), the Board indicated that under *Gross*, an opinion which stated that pneumoconiosis was one of two causes of a miner's totally disabling pulmonary condition was sufficient (even if it did not attempt to apportion the relative contributions), but that a report that did not address all of the etiological factors for the miner's total respiratory disability was inadequate (even though it stated unequivocally that the Claimant's disability was caused by pneumoconiosis). *Phillips* slip op. at 3 to 4. The Board went on to note that "[a] physician must state the basis for his opinion and explain how the

[17] As noted above, in *National Mining Assn. v. Dept. of Labor*, 292 F.3d. 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit found the portion of 20 C.F.R. § 718.204(a) providing that unrelated nonpulmonary or nonrespiratory conditions causing disability will not be considered in determining whether a miner is totally disabled due to pneumoconiosis to be impermissibly retroactive. The section was otherwise upheld.

[18] The decision is available on the BRB website, which may be accessed via a link from the OALJ website, www.oalj.dol.gov.

objective data supports his diagnosis in order for his opinion to be considered both documented and reasoned." *Id.*

I find that Dr. Rasmussen's opinion, which attributed the disability to both smoking and coal mine dust, qualifies to establish causation of total disability under both *Gross* and *Phillips.* Neither Dr. Fino nor Dr. Castle found pneumoconiosis, so their opinions are of little use on the causation issue. Moreover, Dr. Castle did not find total disability, and Dr. Fino, while suggesting idiopathic interstitial pulmonary fibrosis as a working diagnosis, was uncertain as to the etiology of that condition or the cause of the disability he found. Under these circumstances, I find that Dr. Rasmussen's opinion establishes disability causation.

CONCLUSION

Having established all of the requisite elements of entitlement under the Act and regulations by a preponderance of the evidence, Claimant is entitled to receive benefits.

In addition, I find that Valley River Mining, Inc. should be dismissed, because the preponderance of the credible evidence shows that it did not employ the Claimant for a cumulative period in excess of one year.

Onset Date

Under section 725.503(b), for a miner's claim, benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment but "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." None of the medical evidence or testimony offered in connection with this claim conclusively establishes the precise date that Claimant first became totally disabled due to pneumoconiosis. Here, the claim was filed on October 2, 2003. Accordingly, benefits shall commence as of October 1, 2003.

Attorney's Fee

No award of an attorney's or representative's fee is made herein because no fee application has been received. *See* 30 U.S.C. § 932; 33 U.S.C. § 928. The Claimant's attorney shall have thirty days for submission of a fee application in conformance with 20 C.F.R. Part 725 and the other parties shall have thirty days to file any objections, provided that these dates may be extended upon the stipulation of the parties or for good cause shown.

ORDER

IT IS HEREBY ORDERED that the claim of H.D. for black lung benefits be, and hereby is, **GRANTED;** Valley River Mining, Inc. is **DISMISSED** as a party; and payment shall continue to be made to the Claimant from the Black Lung Disability Trust Fund.

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, DC

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed. At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen H. Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).